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No. 91-1425

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,
Petitioners,

v.

JOHN G. BROWN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a United States District Court have jurisdiction to stay the execution of a state death penalty judgment where the prisoner has filed only a request for the appointment of counsel but has never filed a petition for writ of habeas corpus or anything that could reasonably be construed as a petition?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Daniel Vasquez, Warden, California State Prison at San Quentin, California and Daniel E. Lungren, Attorney General of the State of California, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, issued on December 31, 1991.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit is reported as Brown v. Vasquez ___ F.2d ___ (1991 U.S. App. LEXIS 30183) and appears as Appendix A (pages A-1 through A-25). The amendment to the opinion appears as Appendix B. (Pages B-1 through B-2.)

The published opinion of the District Court is reported as Brown v. Vasquez 743 F.Supp. 729 (C.D. Cal., 1990) and appears as Appendix C (pages C-1 through C-15).

JURISDICTION

Petitioners invoke the jurisdiction of this Court, under Title 28, United States Code, section 1254 (1) to review a judgment of the United States Court of Appeals for the Ninth Circuit which was filed on December 31, 1991. This petition is filed within the required 90 day period following the entry of judgment. The

decision is a final decision interpreting provisions of the United States Constitution, various sections of the United States Code, and Local Civil Rule 26.8.7 of the Central District of California.

STATUTORY, CONSTITUTIONAL, AND LOCAL COURT RULES INVOLVED

Title 18 United States Code section 3006A, subdivision (2)(b) states: "Whenever the United States magistrate or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who . . . (B) is seeking relief under section 2241, 2254, or 2255 of title 28."

Title 21 United States Code section 848, subdivision (q)(4)(b) states: "In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially

unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)."

Title 28, United States Code section 2251 states: "A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

Local Civil Rule 26.8.7 of the United States District Court for the Central District of California states:

"(a) Stay Pending Final Disposition: Upon the filing of a habeas corpus petition,

unless the petition is patently frivolous, the district court shall issue a stay of execution pending final disposition of the matter.

(b) Temporary Stay for Appointment of Counsel: Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection panel will designate any attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay shall remain in effect for forty-five (45) days unless extended by the court."

STATEMENT OF THE CASE

Respondent was convicted of the murder of a peace officer and sentenced to death by a California Superior Court. The conviction was affirmed on direct appeal by the California Supreme Court. People v. Brown 46 Cal.3d 432, 250 Cal.Rptr. 604, 758 P.2d 1135 (1988). Respondent's petition for writ of certiorari was denied by this Court. Brown v. California, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989). Respondent then filed a petition for writ of habeas corpus with the California Supreme Court. In re Brown, Case Number S009797. On March 14, 1990, the California Supreme Court denied the petition for writ of habeas corpus. On April 13, 1990, the California Superior Court, in and for the County of Orange, set respondent's execution date for June 8, 1990.

On June 1, 1990, respondent filed a pro se request for the appointment of counsel and a request for a stay. Although respondent stated he intended to file a petition for writ of habeas corpus at some undesignated time in the future, the request for stay contained no allegations of federal constitutional violations in the state court proceedings. Nor did the request for counsel contain any allegation that any federal issue had been exhausted in the state courts. Nevertheless, the District Court issued a forty-five day stay of execution pursuant to Central District Local Civil Rule 26.8.7.

Petitioners promptly noticed a motion to vacate the stay of execution. On July 7, 1990, the stay was extended by the court so as to find counsel willing to represent respondent. See Brown v. Vasquez, supra, 743 F.Supp at 730. On

August 13, 1990, the District Court heard petitioners' motion to lift the stay of execution. On September 4, 1990, the court filed its opinion denying the request to vacate the stay. Id.

Petitioners filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit.[1/] In a published opinion filed on December 31, 1991, that court affirmed the decision of the District Court and held that the issuance of the stay was proper even though no habeas corpus petition had ever been filed. (App. A.) The opinion was amended on February 19, 1992. The mandate issued on this same date. (App. B.)

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1. After oral argument in the Ninth Circuit, but before the judgment, respondent finally filed a petition for habeas corpus. However, the petition was defective in that it contained numerous unexhausted claims for relief. The impact of this filing is discussed infra in footnote 3.

HOW THE FEDERAL QUESTION IS PRESENTED

In the United States District Court, petitioners moved to vacate the stay of execution order contending that the District Court lacked jurisdiction to issue a stay in the total absence of a petition for writ of habeas corpus or anything that could reasonably be construed as a petition for writ of habeas corpus.

When the District Court held it had jurisdiction to stay the state execution date in the absence of a habeas corpus petition, petitioners filed a timely notice of appeal with the United States Court of Appeals for the Ninth Circuit. That court affirmed the decision of the District Court.

STATEMENT OF FACTS

The initial filing by the respondent on June 1, 1990, requested the appointment of counsel and a requested a stay of

execution. The request stated, "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition." Brown v. Vasquez, supra, ___ F.2d ___ (1991 U.S. App. LEXIS 30183) (9th Cir. 1991.) (Appendix A-3.) Although respondent stated he intended to file a petition for writ of habeas corpus at some undesignated time in the future, the request for stay contained no allegations of federal constitutional violations during the state court proceedings. Additionally, the request made no allegations that any federal claims had been exhausted in the state courts. Nevertheless, the District Court issued a stay and then later denied petitioners' motion to vacate the stay.

In a published decision issued on December 31, 1991, (and amended on February 19, 1992) the United States Court of Appeals for the Ninth Circuit upheld the jurisdiction of a district court to stay execution of a state death sentence even though the prisoner has filed only a request for counsel but has never filed a federal habeas corpus petition or anything that could reasonably be construed as a petition.

ARGUMENT

I

THE UNITED STATES DISTRICT COURT LACKED JURISDICTION TO STAY THE EXECUTION OF A STATE DEATH SENTENCE WHEN THE PRISONER FILED ONLY A REQUEST FOR THE APPOINTMENT OF COUNSEL BUT NOT A HABEAS CORPUS PETITION

In this state death penalty case, the Court of Appeals for the Ninth Circuit ruled that a federal district court has the inherent power to stay the execution of a state death sentence even though the prisoner has not filed a petition for habeas corpus but has only filed a request for counsel. The decision of the Ninth Circuit is in error. A United States District Court has no inherent power to stay execution of a state death sentence. The District Court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus." (Reese v. Teets, 248 F.2d 147, 149 (9th Cir. 1957) The power to stay a state court death

order is solely statutory, as is the power of the court to appoint counsel. There is no inherent authority for a United States District Court to stay a state court proceeding apart from its specific habeas jurisdiction. This Court should grant certiorari to instruct the lower federal courts on the limits of their jurisdiction to grant a stay of execution where no habeas corpus petition has ever been filed.

This is not a concern limited to the Central District of California. With the approval of the Ninth Circuit, <u>every</u> federal district in California has adopted rules for conducting death penalty habeas corpus proceedings which permit the issuance of a stay order by a district court before any petition for habeas corpus has been filed. See Eastern District General Rule 191(h)(2), Northern District Civil Rule 296-8(b), Southern

District Civil Rule 295-2 (h)(2). In at least thirty seven (37) capital cases in which petitioners are named parties, stays have been issued by United States District Courts when no petition for writ of habeas corpus has been filed.[2/] Indeed, some of these case were delayed for as long as two years without a petition being filed! (See entries number 17 and 27 on Chart One, Appendix D, pages D-2 and D-4.) There are another 300 prisoners on California's death row, the majority of whom, predictably, will be filing similar requests for stays. Thus, the problem presented in this case is merely the first of an onslaught of cases from California's death row which will soon engulf the federal district courts in California. Unless this Court acts, petitioners face

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2. A listing of the cases where a stay of execution has been issued by a federal district court in the absence of a habeas corpus petition is set forth in Appendix D at D-1 through D-5.

the very real prospect of having to deal with hundreds of stay orders issued by federal district courts in the total absence of any colorable showings of a constitutional violation and in the total absence of any claims of exhaustion. This Court should act before this practice works to improperly delay scores of death judgments.[3/] See In re Blodgett ___ U.S. ____ 60 U.S.L.W. 3476 (1992 Per curiam opinion).

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3. While a defective petition for writ of habeas corpus was finally filed in this case, over a year after the first stay order was imposed, the issue presented is not moot. Given petitioners' immediate and continual attempts to have this stay vacated, given the number of other cases in which similar stays have been granted, and given the hundreds of potential cases in which similar stays will presumably soon issue, it is clear that the issue presented by petitioners is one "capable of repetition yet evading review." Moore v. Ogilvie 394 U.S. 814, 816 (1969); See also Anderson v. Celebrezze 460 U.S. 780, 784, n.3 (1983). See also Appendix C-8.

Rule 26.8.7 of the Local Civil Rules of the Central District of California purports to authorize the District Court to issue a temporary stay of execution when a state prisoner sentenced to death applies for the appointment of counsel to assist him in preparing a federal habeas corpus petition. Once counsel is appointed, an additional temporary stay may be granted to allow counsel an opportunity to review the record and prepare a full petition. Under the local rule, the stays may be granted without the need for any petition, or its functional equivalent, to be filed. Such stays may be granted in the total absence of a claim that any issues at all have been exhausted in the state courts. Petitioners submit that a district court has no jurisdiction to enter a stay under those circumstances. The filing of a valid petition containing exhausted claims is a necessary

prerequisite to the federal court having jurisdiction to intrude into the state court proceedings. There is no dispute that after a habeas corpus petition has been filed a district court has the power to issue a stay of a state execution. But the court has no such power unless and until such a petition has been filed.

The decision of this Court in Demosthenes v. Baal, 495 U.S. 731, 110 S.Ct. 2223, 109 L.Ed.2d 762, (1990), decided after the local rule was adopted, makes it absolutely clear that a federal court has no jurisdiction to issue a stay unless a valid habeas corpus petition has first been filed by the inmate. Moreover, the local rule is incompatible with the explicit order of this Court in Blodgett that a federal court must not issue a stay in a state capital case unless it takes "all steps necessary" to resolve the matter expeditiously. (In re Blodgett,

___ U.S. ____ 60 U.S.L.W. 3476 (1992 Per curiam opinion) Indeed, this assumed power to issue a stay in the absence of a petition is an invitation to delay.

In Demosthenes v. Baal, supra, a Nevada inmate, Thomas Baal, was a week away from his execution date. He chose not to pursue any further federal collateral review. Nevertheless, his parents filed a petition for federal habeas corpus relief as "next friend" of Thomas Baal. The petition alleged that Baal was not competent to waive federal review of his claims. The District Court held hearings on the claim and then denied relief holding that the court had no jurisdiction to entertain the petition. A certificate of probable cause was denied. The parents appealed to the Ninth Circuit. A divided panel of the Ninth Circuit granted the parents a certificate of probable cause and issued a stay.

This Court vacated the stay and held that because the parents had not made a sufficient showing of mental incapacity, the District Court was without jurisdiction to issue a stay. In the absence of a valid petition for habeas corpus, the District Court had no jurisdiction to act. This Court specifically noted that:

> ". . . federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention."

Demosthenes v. Baal, supra, 495 U.S.___, 109 L.Ed.2d at 769 (emphasis added)

Because no petition for writ of habeas corpus had been filed by respondent in this case, the District Court had no jurisdiction to issue a stay. A mere statement a state prisoner wishes to file a federal habeas corpus petition at some undesignated time in the future is insufficient. Without some type of actual petition alleging suitable grounds for relief, a district court lacks jurisdiction to issue any stay. The actions of the District Court and the Ninth Circuit were completely contrary to the holding in Baal and require this Court's intervention. A writ of certiorari should issue.

Title 28 United States Code section 2251 authorizes the issuance of stay by the judge "before whom a habeas corpus

proceeding is pending." As mentioned above, in Reese v. Teets, 248 F.2d 147 (9th Cir. 1957), the Ninth Circuit specifically held that a district court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus." (Id., at 149.)[4/] Although the petition in Reese was found to be defective, and thus outside the court's jurisdiction because it raised unexhausted claims, other courts have granted stays in order to preserve their jurisdiction while state proceedings are completed. In each case, however, an actual petition for habeas corpus had been filed in the District Court and its allegations formed the basis for a stay request. See e.g., Modesto v. Nelson, 296

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4. While it is true that the procedural framework surrounding *Reese* has been greatly changed, the statements of the limitation of the district court's power still have validity.

F.Supp. 1375 (ND Calif. 1969); Moorer v. State of South Carolina, 240 F.Supp. 529 (ED SC 1964); United States ex rel. La Marca v. Denno, 159 F.Supp. 486 (SD NY 1958); see also Smith v. Armontrout, 825 F.2d 182 (8th Cir. 1987) [stay of execution in conjunction with habeas corpus petition by relative challenging the inmate's competency to waive further appeals].

In Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980), the Fourth Circuit noted in ruling on an application for stay of an execution date that a federal court's authority is limited to preserving its own jurisdiction, although a stay may effectively permit proceedings to continue in other courts as well. Id., at 491, n. 1. Petitioners have found no published decision other than the one at bar, in which a district court acted without a petition before it. However, in at least

thirty seven (37) cases in which petitioners are named parties, the United States District Courts in California have issued stays when no petition had been filed. (See Appendix D.) Given the published decision in this case, it is likely that federal courts in other jurisdictions will follow suit.

The few relevant authorities support the conclusion that a petition is an absolute jurisdictional prerequisite to the issuance of a stay. See generally Liebman, Federal Habeas Corpus Practice and Procedure §§ 4.3, 6.3, 9.3, 13.3, (1988). The most useful decision is Hooks v. Wainwright, 540 F.Supp. 652 (M.D. Fla. 1982), a class action by Florida death row prisoners which challenged access to the courts and the right to counsel. A member of the class, Timothy Palmes, sought a stay of his execution date from the court before whom the class action suit was

pending. Palmes argued that a previous order in the case, which compelled the state to formulate a plan for providing death row inmates with counsel,[5] entitled him to a stay so that Florida could appoint an attorney for the purpose of preparing state and federal collateral attacks on his judgment. Hooks v. Wainwright, supra, 540 F.Supp. at 653-654. Citing Reese v. Teets, supra, the court concluded that a federal court could issue a stay "only in connection with a habeas corpus proceeding." Id., at 654. "[T]he principle enunciated in Reese . . . is, that federal judicial authority to stay execution of a sentence . . . is limited to cases in which the court's habeas

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5. The district court's holding on this issue was subsequently reversed by the Court of Appeals, which held that the state had no obligation to provide counsel for collateral attacks on the conviction. (Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), cert. denied, 479 U.S. 913 (1986).)

corpus jurisdiction has been properly invoked." Id., at 655; emphasis added. The court concluded that habeas corpus is "the only legal remedy that potentially offers the primary relief which [Palmes] is seeking, i.e. stay of his execution." Id. Petitioners have found no authority for the proposition that habeas corpus jurisdiction is invoked solely by expressing an expression of intent to seek such relief. Hooks supports the conclusion that a stay may not be issued unless the petition has been filed. See also In re Lindsey, 875 F.2d 1518, 1519 (11th Cir. 1989).

Additionally, in the absence of a petition for habeas corpus there is no way for a district court to ascertain if any of the potential, but as yet unraised, claims have been exhausted in the state courts. This Court has made it abundantly clear that a United States District Court

may not consider a federal habeas corpus petition unless all of the claims presented have been exhausted in the state courts. Failure to exhaust state remedies as to every claim made in a petition for writ of habeas corpus requires dismissal of the entire petition without reaching the merits of any of the claims. Rose v. Lundy 455 U.S. 509, 522.(1982 per curiam opinion) If there is no petition, there can be no showing of exhaustion. Without a showing of exhaustion the court is required to dismiss the petition. Thus, the position assumed by the Ninth Circuit, applicable to all three hundred (300) prisoners on California's death row, and potentially applicable to all the other inmates in the states in the Circuit that have capital punishment, would allow the issuance of a stay without either the filing of a petition or the allegation of exhaustion by the inmate. This Court

should act to prevent such a substantial, unauthorized expansion of the limited, statutory powers of the federal district courts.

It must be stressed that the result petitioners seek does not place an onerous burden on a death row inmate. All an inmate would need to do is fill out the standard preprinted federal habeas corpus form and set forth the federal issues presented to the state supreme court in the direct appeal or any companion habeas corpus petition and add a statement that the matters have been exhausted. This could be accomplished by merely copying the table of contents of each document onto the standard federal habeas corpus petition form and adding the relevant factual information. Surely asking a death row inmate to do what every other state prisoner who seeks federal relief must do-fill out a pre-printed habeas

corpus petition form-cannot be considered overly difficult or arduous. Cf. U.S. v. One 1978 BMW 624 F. Supp. 491, 492 (D. Mass 1985) ["So long as one is able to obtain paper, pencil and a stamp the effort . . . is minimal."] Once such a proper petition has been presented, the court has jurisdiction to issue a stay and can appoint counsel[6/] who can more fully present the legal arguments to the court.

Furthermore, there is no validity to the Ninth Circuit's assertion that because the District Court had the power to appoint counsel it had the power to stay the state proceedings. Without a petition, the District Court had neither the power to appoint counsel nor the power to stay the state execution order. As this Court has specifically held, there is

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6. Just as important, the court may be able to determine that the proposed issues are without merit and deny the petition outright.

no constitutional right to counsel in federal habeas corpus proceedings. McClesky v. Zant 499 U.S.___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). The right to appointment of counsel is strictly statutory. Title 18 U.S.C. section 3006A(a)(2)(B); Title 21 U.S.C. section 848(q)(4)(B); Title 28 U.S.C. section 2251.

Under each of these statutes, appointment of counsel can be undertaken by the court only if the proceeding has reached the point where it can be said there is an action pending. In Title 18 U.S.C. section 3006A (a)(2)(B) the statute requires that there be a financially eligible person "seeking relief." In the case at bar, the prisoner was not yet seeking relief in any way. He specifically stated that the request for relief might come at some time in the future. It cannot be said that the

request for counsel could be construed as an inmate "seeking relief." Similarly, Title 21 U.S.C. section 848 (q)(4)(B) requires that there be proceedings under section 2254. But a section 2254 action requires the filing of a petition. And as the Ninth Circuit specifically found in the case at bar, the death row inmate's request for counsel could in no way be construed as a petition for writ of habeas corpus. (Appendix A-8 - A-9.)

In summary, because none of the prerequisites for appointment of counsel had been meet, the District Court lacked jurisdiction to appoint counsel. Since the power to appoint counsel was the sine qua non of the Ninth Circuit's decision, the District Court lacked either direct authority or jurisdiction tied to the right to appoint counsel upon which to base a stay order. Thus, it is evident that without the filing of a habeas corpus

petition, or a document that can be liberally characterized as such, a United States District Court lacks not only the power to appoint counsel but also lacks the jurisdiction to stay a state ordered death sentence.

Additionally, petitioners submit that this Court's recent decision in In re Blodgett ___ U.S.___, 60 U.S.L.W. 3476 (1992 Per curiam opinion) directed to the Ninth Circuit, has supplanted both the decision of the Ninth Circuit in the case at bar as well as Central District Local Rule 26.8.7. In Blodgett, this Court addressed the Ninth Circuit's two and a half year delay of a Washington capital case in which that court had granted a stay of the execution date. This Court's per curiam opinion found that the state had been prevented from "exercising its sovereign power to enforce the criminal law." This Court held that this was an

interest which had to be accorded "great weight." This Court found that the Ninth Circuit, having granted the stay, had a duty to consider the claims raised by the petitioner without delay because of the potential of prejudice to the State of Washington. If a stay can issue in the absence of any alleged basis for federal jurisdiction, then there is no possible way for the court to consider the claims on the merits "without delay." Thus the holding of the Ninth Circuit in the case at bar is in direct conflict with the strong state interests identified by this Court in Blodgett. A stay in the absence of a petition has been filed violates the clear policy dictates of this Court in Blodgett.

Therefore, a United States District Court has no inherent power to either appoint counsel or stay the state court judgment. Only once a proper habeas

corpus petition is filed does a District Court acquire jurisdiction sufficient to appoint counsel and/or stay the state court's sentence. In the case at bar, because the Ninth Circuit found that no document had been filed that could be considered a petition for habeas corpus, the District Court lacked the authority to stay the state court judgment. The District Court acted in excess of its jurisdiction and to the substantial detriment of the state when it stayed the execution date. The Ninth Circuit's decision proclaiming an inherent power to stay as a concomitant to the power to grant counsel is unsupported in either case law or any decision of this Court. This Court should grant certiorari to clarify that a United States District Court has no power to intervene in a state's enforcement of it own laws and

judgments unless and until a federal habeas corpus petition is actually filed.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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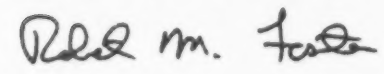

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I have caused service of the within

PETITION FOR WRIT OF CERTIORARI AND APPENDICIES

To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named below as follows: each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 3rd day of March, 1992.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, March 3, 1992.

Rosemary Carmona

ROSEMARY CARMONA

Subscribed and sworn to before me
this 3rd day of March, 1992.

Anne Marie Buford

Notary Public in and for said County and State

ANNE MARIE BUFORD
Notary Public—California
County of San Diego
My Commission Expires 11/19/93